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WFCR.org
Public Radio for Western New England

Thursday, August 26, 2004

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

**Re: MM Docket No. 04-232 — Notice of Proposed Rulemaking: *Retention by Broadcasters of Program Recordings***

Dear Ms. Dortch:

Public radio station WFCR-FM, Amherst, Massachusetts ("WFCR"), licensed to the University of Massachusetts, respectfully submits these comments urging the Commission not to adopt its proposal to require all radio and television stations to record their programming, as contained in *Retention by Broadcasters of Program Recordings*, Notice of Proposed Rulemaking, MB Docket No. 04-232 (rel. July 7, 2004) ("Notice").

## 1. Overinclusiveness

A requirement for the recording of broadcasts, if imposed at all, should be targeted toward where the problem actually lies, and not reach farther than it needs to. While this overlaps with one aspect of First Amendment analysis — to the extent that a chilling effect can result from a requirement to record more than is needed, thereby violating the obligation to ensure that "the incidental restriction on alleged First Amendment freedoms is no greater than is

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essential to the furtherance of that interest"[1] — we will not be exploring First Amendment issues here, as it is our understanding that other parties will be doing so in their comments.

We would, however, like to consider the scope of the proposal from another perspective, and urge that just as a matter of policy, if nothing else, a recording requirement should tightly respond to an identified problem. That is not accomplished in this case, for the data cited in the Notice do not support a conclusion that the problem addressed is so widespread among broadcasters as to warrant imposing this burden on all of them.

For this analysis, we rely on the statement in the Notice that "[f]or the period between 2000 and 2002, the Commission received 14,379 complaints covering 598 programs and denied or dismissed 169 for the lack of a tape, transcript or significant excerpt."[2]

The Notice makes it clear that the recording requirement has been proposed because of those instances where the Commission does not have sufficient information to act, and the accompanying statement by Commissioner Michael J. Copps emphasizes that motivating concern.[3] However, the Commission's own data suggest that it does, in fact, have an adequate record in nearly all cases, since only 1.2% of the complaints cited were dismissed for lack of one.

Additionally, the data cited do not demonstrate that the underlying problem of indecency is pervasive, for they do not show how many of the remaining complaints were valid ones warranting an investigation, how many of the 598 programs complained about actually needed to be investigated, or how many of the individual programs were really episodes of the same,

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1 *United States v. O'Brien,* 391 U.S. 367, 377

2 *Notice*, n. 8

3 *See* Statement of Commissioner Michael J. Copps, *Notice.*

continuing daily or weekly program. Nor do they show the outcome of the investigations, indicating how many of the programs were ultimately found to be in violation of the indecency rules.

Most importantly, the data do not show how the complaints were distributed among programs and stations. Many broadcasters believe that only a few programs are regularly the cause of complaints, an observation in accord with the statement of Commissioner Michael J. Copps accompanying the recent settlement of alleged violations by stations of Clear Channel Communications.[4] He wrote that "over two-thirds of the indecency fines proposed by the Commission since 2000 have been against Clear Channel," and identifies Infinity as a second frequent recipient of fines, saying that "over the past few years, Infinity is second only to Clear Channel in the number of fines."

This shows that the great majority of fines issued in recent years have been directed at the stations of only two radio networks. It seems unnecessary to impose a recording burden on all stations when the problem is so limited. Rather than targeting the action where it arguably would be most needed, the proposal makes no distinction between stations with a history of offense and those with none.

Although the matter it addressed was different in several respects, the plurality opinion in an earlier instance of a requirement to record programs spoke to the problem of recording more than is needed for the stated purpose when it said, referring to the rationale in that case, "application of the recording requirement is not tied to the particular programs which are

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[4] Dissenting Statement of Commissioner Michael J. Copps, *In re Clear Channel Communications, Inc., et al.*, NAL Acct. No. 200432080140, FCC 04-128 (rel. June 9, 2004)

produced with federal funds."[5] For this proposal, we might say, "application of the recording requirement is not tied to the particular programs whose history might suggest a need for heightened oversight." Chief Judge Wright also observed that the recording proposal he addressed was "wholly unrelated to the rationale of oversight"[6]; while we do not suggest that the instant proposal is "wholly unrelated" to its rationale, we do suggest that imposing a burden on thousands of stations to "catch" only a few possible offenders suggests a poor alignment between problem and solution. Chief Judge Wright was troubled that the recording requirement he addressed "requires licensees to record some programs, which, ...should not be recorded in light of the stated purpose. Such 'overinclusiveness' of the statute's application is inconsistent with O'Brien's additional requirement that governmental regulations be no more restrictive than is essential to further the substantial goals served."[7]

As it is, the proposed requirement treats as one stations with the most notorious programs and those with the most innocuous. Although the Commission may not be able to make a distinction between stations of different formats, our own field of public radio can serve as an illustration of the overly broad reach of the proposal, for it is unclear what is to be gained by the recording of thousands of hours of classical music when the real offenders, if any, lie elsewhere.[8]

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[5] *Community-Service Broadcasting of Mid-America, Inc. et al., v. FCC,* 593 f.2nd at 1120 (D.C. Cir. 1978) (Wright, J., plurality opinion). The statute and regulation at issue required the recording of public affairs programs broadcast on public stations receiving federal funding in specified ways.

[6] *Id.* at 1120

[7] *Id.* at 1120

[8] WFCR, a public radio station, may serve as one example. A recording of weekday programming from 6:00 a.m. to 10:00 p.m., a period of sixteen (16) hours, will record nine (9) hours of unobjectionable classical music and jazz. Extending the weekday recording to a 24-hour period would add seven (7) more hours of classical music and jazz. (Similar results will be found in the recording of weekend programming, as well.)

**2. A New Technical Burden**

In paragraph 9, the Notice asks about current practices in regard to recording and retaining programming. It is important for the Commission to have this information in order to understand the impact of the proposal. We think it indicative that the Notice almost always refers to the proposed rule as pertaining just to the *retention* of recordings, suggesting that the Commission may be assuming that most stations already make such recordings and only have to be ordered to save them for a set period of time.[9]

We know of no data that has been assembled on this point, but our staff's impression, based on years of broadcast experience in a variety of settings, is that the great majority of stations do not make such recordings.

In light of that, we urge the Commission not to proceed on an assumption that recording is a common practice, which would incorrectly lead to the view that this proposal concerns only storage policies. Rather, it should understand the rule as imposing a new technical requirement on the majority of stations. There is a considerable difference in burden between merely *retaining* for a longer period of time recordings that are already being made and *initiating* a new recording process for which the station must acquire, install, maintain and manage a new technical system.

Paragraph 9 of the Notice also asks about "the financial burden the proposals may impose." This is indeed relevant, for the cost of compliance with a recording requirement was a

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[9] For example, "we propose to require that broadcasters *retain* recordings of their programming," par. 1; "proposed program recording *retention* requirements," par. 3; "requiring broadcasters to *retain* recordings of their broadcast for a limited period of time," par. 6; "requiring broadcasters to *retain* a recording," par. 7; "record *retention* requirements," pars. 7 and 9; [emphasis added].

factor in the plurality opinion in Community-Service Broadcasting of Mid-America.[10] WFCR estimates a cost of $5,000 for the acquisition and installation of appropriate equipment and software; there would also be ongoing expenses for management, repair and parts replacement.[11] For WFCR, a public radio station dependent on listener and corporate donations, as for many small broadcasters generally, this new requirement will demand a significant portion of the station's annual budget for new equipment.

As a sidenote, we see that the Notice indicates that digital television broadcasts could be recorded with a lower bit rate than that transmitted.[12] If the proposal is adopted, radio stations, too, should be permitted to digitally record their analog programming at a bit rate lower than would be required for "perfect" audio fidelity to the original broadcast. This would be sufficient for a recording made for this purpose and save on the cost of hard drive space needed for storage.[13]

### 3. The Broadcast Complaint Process

The Notice asks "whether the proposed requirements should affect our established broadcast complaint process," and whether "a complaint containing a general description of the

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[10] *Community-Service Broadcasting of Mid-America, Inc. et al., v. FCC,* 593 f.2nd at 1114, n.26 (D.C. Cir. 1978) (Wright, J., plurality opinion)

[11] The estimate makes the assumption that, since this would be a legal requirement, two independent computers would be needed to assure recording. The model budget includes two standard PC-type computers, each with logging software, a special soundcard, and extra-large hard drives for the amount of data required; both would be protected by a shared UPS. Installation costs are also included. All computers have a limited lifespan, so this is not a one-time purchase but one that will have to be repeated in a few years. We note that a station wanting to achieve a higher level of security for the audio files than we have modeled could need to spend $12,000 on a pair of servers with RAID capability.

[12] *Notice*, par. 9

[13] WFCR's estimate of equipment cost assumes the application of such a technical solution.

relevant broadcast may be adequate to trigger Commission action because we could obtain the actual recording from the station."[14]

We urge the Commission to maintain the requirement that the complainant provide enough information to give the Commission "some sense of whether the material broadcast may have violated the law before [it commences] an inquiry."[15] This is useful as a check or filter for complaints that are ill-advised or mistaken and warrant no further action. Importantly, as the Notice states, the burden on the complainant is not high, for "the amount of information need not be extensive."[16]

If the standard is changed as suggested, allegations of violation that are well meant but have no real merit would automatically trigger Commission action. It is also imaginable that a lowered standard could be exploited by complainants seeking more to apply excess pressure on the Commission or stations than to simply aid in enforcement, and the door would be open for people who wish to harass a station for reasons entirely unrelated to enforcement of the indecency rules. The Commission, and consequently stations, could be flooded with complaints that, without the filter of an initial review process, would have to be fully acted upon. This would place a severe burden on stations in time and money spent on responding to poorly justified complaints; it would also greatly burden Commission staff, who would have to listen to and evaluate thousands of hours of transcripts and audio recordings.

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[14] *Id.*, par. 8

[15] *Id.*, par. 8

**4. Other Uses**

The Notice asks whether the recording requirements "should be crafted so that they can be useful to enforcement of other types of complaints based on program content."[17] In general, we suggest that the recording requirements not be extended without a targeted inquiry into any such possibility. Such a pervasive use of the recordings could only make even greater the concerns that would arise from the "chilling effect" knowledge that there is a government watcher.

One of the specific questions was whether the recordings could be used for enforcing sponsorship identification requirements and "whether there have been problems in enforcing those requirements."[18] WFCR, as a non-commercial, public radio station, regularly acknowledges corporate underwriting. Our existing methods provide an adequate record of these announcements, for the specific language to be used is agreed to between the station and its underwriters, and announcers are provided with exact scripts to use, which they carefully follow. No new recording system is needed for us to know what the texts of our underwriter acknowledgments are.

Although the Notice does not suggest that another use of the recordings could be to make them part of the public file, we would nevertheless like to comment on that as a possibility and strongly urge that they not be made part of the public file. Since members of the community must be permitted immediate access to all public file documents on request, listeners would be able to go to a station and demand to hear a playback of any broadcast program — of *every*

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[16] *Id.*, par. 4

[17] *Id.*, par. 7

[18] *Id.* par. 7

broadcast program — without limit. This would turn stations into program libraries, the burden of which would be great.

Experience suggests that, even outside the formality of the public file, some listeners will learn of the recordings and ask to listen to them. It would be impossible for stations to provide such a service. We urge the Commission to state that the recording requirement, if adopted, is not intended to turn stations into libraries of their programming for public use, and that a station's ability or inability to play back programs for listeners is not to be a measure of its public service as a broadcaster.

We are also concerned about the open-ended nature of the statement that "broadcasters may find it in their interest to retain recordings for a longer period than the proposals above suggest."[19] Once a recording exists, would the Commission expect a station to retain it beyond the mandated period? Would the Commission informally approach a complaint review with the thought that even though a station did not *have* to retain a recording beyond a specified time, it prudently *should* have? Commission policy should state that the "real world" expectation will not exceed the requirement and that stations will not be disadvantaged if they follow the rule strictly.

**5. <u>Digital Radio</u>**

The Notice asks about application of the proposal to digital radio broadcasting, and to "all digital streams."[20] Of course, no additional recording needs to be made of that part of a digital radio broadcast that duplicates the analog broadcast. Although we oppose the application

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[19] *Id.*, n. 9

[20] *Id.*, par. 7

of this rule, we concede that, if it is ordered, a secondary audio channel that operates as the equivalent of a "regular" radio station, such as one that might be created consistent with National Public Radio's "Tomorrow Radio" project, would logically need to be similarly recorded. We would add, however, that the increase in file storage requirements resulting from the recording of a second program stream could increase the cost of the equipment needed.

Finally, although the possibility was not mentioned in the Notice, we urge the Commission not to impose a recording requirement on any Radio Reading Service carried on an SCA channel, such as those broadcast by many public radio stations, including WFCR. The fundamental nature of that service is very different from that of "mainstream" programming, and the cost of making such a recording would certainly be excessive in light of the service's typical contents and the very limited budgets of most reading service program providers.

## Conclusion

Because the proposed requirement for recording exceeds the size and scope of the problem it addresses, is not limited in application to where it arguably is most needed, imposes a new and expensive technical burden on stations, could result in excessive numbers of complaints with no real merit, and opens the door to even more pervasive intrusions into station operations, WFCR respectfully urges the Commission not to adopt the requirement for recording contained in the Notice.

Sincerely,

Richard Malawista
Director of Broadcasting